

# FINAL STATEMENT OF REASONS

## **UPDATE OF INITIAL STATEMENT OF REASONS**

The Notice of Proposed Regulations was published on May 6, 2016. The Notice of Proposed Regulations was mailed the same day in addition to being posted on the CALPIA website. A public hearing was requested on May 25, 2016 and then set for July 20, 2016 at 11:00AM. There were no attendees at the public hearing. During the 45-day comment period, comments were received. A summary of the public hearing request is included under the heading, "Summary of Public Hearing Request." A summary of the comments and responses are included under the heading, "Summaries and Responses to Public Comments."

Based on recommendations made by OAL, a determination was made to amend the proposed regulatory text and add a Supplement to Initial Statement of Reasons.

A 15-day notice of changes was made available for public comment from September 15, 2016 through October 3, 2016. No comments were received. These changes and reasons for them are found below under the heading "Changes to the Rulemaking File."

## **LOCAL MANDATE:**

The proposed regulations do not impose any mandate on local agencies or school districts.

## **ALTERNATIVES THAT WOULD LESSEN ADVERSE ECONOMIC IMPACT ON SMALL BUSINESS:**

No alternatives were proposed to CALPIA or Prison Industry Board that would lessen any adverse economic impact on small business.

## **ALTERNATIVES DETERMINATION:**

CALPIA has determined that no alternative it considered or that was otherwise identified and brought to its attention would be more effective in carrying out the purpose for which the action is proposed, would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

Except as set forth and discussed in the summary and responses to comments, no other alternatives have been proposed or otherwise brought to the attention of CALPIA or Prison Industry Board.

## **SUMMARY OF PUBLIC HEARING REQUEST**

**June 1, 2016** - CALPIA received a request for a public hearing from Tim Neep, Director of International Union of Operating Engineers.

**June 3, 2016** - CALPIA responds to Tim Neep, explains public hearings are for comments, not discussions or explanations of regulations. CALPIA offers to meet with Mr. Neep in order to discuss regulations and answer questions; Mr. Neep is also offered the opportunity to submit his comments during this informal meeting. CALPIA received no response.

**June 8, 2016** - A letter is mailed to Tim Neep, reiterating the email sent to him on June 3, 2016. CALPIA received no response.

**July 14, 2016** - Because no response was received to our offer to meet, CALPIA sent out a Notice of Public Hearing. CALPIA received no response.

**July 20, 2016** - Public Hearing was held; no attendees. Public Comment Period closed; Tim Neep never responded to any correspondence or notice from CALPIA.

## **SUMMARIES AND RESPONSES TO WRITTEN COMMENTS:**

**Commenter:** Danny Brown, Deputy Director of Legislation  
Department of Human Resources (CalHR)

**Comment (1):** To what extent do these regulations require a notice and/or obligation to meet and confer under the Ralph C. Dills Act and the Excluded Employee Bill of Rights? How have/or will these obligations be met? When must these obligations, if any, be met in relation to the proposed rulemaking?

**Response:** The identification of "sensitive" positions and the drug testing of employees occurs under the authority and direction of Executive Order D-58-86, signed by former Governor George Deukmejian. The scope of public employee organizations, under the Ralph C. Dills Act, is set forth in Government Code sections 3500 et. seq.

*Government Code section 3516 states:*

The scope of representation shall be limited to wages, hours, and other terms and conditions of employment, except, however, that the scope of representation shall not include consideration of the merits, necessity, or organization of any service or activity provided by law or executive order.

Therefore, under the Ralph C. Dills Act, the drug testing of employees is not a matter subject to collective bargaining and therefore not subject to a "meet and confer" request by any state recognized bargaining unit. CALPIA does not need bargaining unit approval to move forward with completing the process of expanding drug testing regulations.

The obligation to notice and/or meet and confer under the Excluded Employee Bill of Rights was satisfied. Notice was sent to Nellie D. Lynn, Assistant Director of Representation - ASSOCIATION OF CALIFORNIA STATE SUPERVISORS - 1240 E. Ontario Avenue Suite #102-337, Corona, CA 92881 on or

about May 6, 2016. The ACSS did not make any comments, request any public hearing, or ask to meet and confer.

**Comment (2):** What is the interaction between these proposed regulations and CalHR's current regulations on reasonable suspicion drug testing? Do these two sets of regulations conflict? Does one set of regulations supersede the other?

**Response:**

CALPIA's proposed language does not supersede CalHR's regulations. CALPIA will continue to implement the requirements of 2 CCR § 599.960-599.966 while also continuing to follow requirements of CalHR's master service agreements (contract language) regarding employee drug testing. CALPIA's proposed language will expand on CalHR's regulations and contract language. See the following explanations in the Initial Statement of Reasons which supports CALPIA's position to expand 2 CCR § 599.960-599.966:

Page 5 of the Initial Statement of Reasons, 'New Subsection 8106.1(a) is proposed to allow CALPIA to test its employees for substances, *in addition to substances that are already regulated in 2 CCR § 599.963(b)*', supports our actions to add to, not contradict, CalHR's current regulations.

Page 9, under heading New Subsection 8106.1(c)(2), of the Initial Statement of Reasons provides language to allow for additional, Federal approved, modern types of scientific drug testing (liquid chromatography/mass spectrometry in addition to gas chromatography/mass spectrometry). This language is not a contradiction nor is this an attempt to supersede CalHR regulations; this is an expansion to CalHR's regulations, this new subsection will allow updated scientific procedures to be used in order to detect drugs.

Page 10, last paragraph of the Initial Statement of Reasons explains that CalHR uses contract language to regulate testing for adulteration of urine sample and define impediment of drug testing. To avoid underground regulation issues, CALPIA is proposing to adopt language that complies with CalHR contract language. Contracts should not be used to regulate employee adulteration or any kind of impediment of drug testing. This proposed language does not supersede or contradict CalHR processes.

Page 10, second paragraph of the Initial Statement of Reasons, 'CALPIA's regulations do not contradict CalHR's contract language' supports our position to add to, not contradict, CalHR's current regulations.'

Page 10, sixth paragraph of the Initial Statement of Reasons states, 'CALPIA's new subsection<sup>1</sup> will not contradict CalHR's contract language, with one exception to time constraints to produce a urine sample.' CALPIA's proposed language will shorten the amount of time required to produce a urine sample. (CalHR provides 3 hours; CALPIA proposes to provide 1 hour).

---

<sup>1</sup> 8106.1(d)(1)-(3)

Page 11, last paragraph of the Initial Statement of Reasons, ‘New Subsection 8106.1(f) is proposed to avoid duplicating regulations, while also remaining compliant with CalHR’s regulations regarding how positive tests results are reviewed . . .’ supports our position to not contradict or supersede CalHR regulations.

New subsections New Subsection 8106.1(g), (h), and (i) are proposed to avoid duplicating regulations, while also remaining compliant with CalHR’s regulations. (see page 12 of the Initial Statement of Reasons)

## **CHANGES TO THE RULEMAKING FILE**

### **Revisions to Regulation Text:**

New Subsection 8106.1(a) is amended to:

- Add text that provides more clarification regarding California Department of Human Resources (CalHR) regulations that are applicable (and not applicable) to CALPIA employees.

New Subsection 8106.1(c)(3) is amended to:

- Add dates for the Code of Federal Regulations (CFR) that are cited and referenced in this subsection. Specifying dates of the referenced CFR will ensure CALPIA’s regulations will not change or become effected in the event changes are made to the CFR in the future.

New Subsection 8106.1(g) is deleted because:

- If a dispute arises over the interpretation of a regulation and the interpretive question is close, deference is given to the agency and the scales are likely to tip in the agency's direction<sup>2</sup>. It is unnecessary to regulate who reserves the right to interpret CALPIA regulations; therefore, this new subsection is unnecessary and is removed from the rulemaking file.

New Subsections 8106.1(h) and (i) were amended to:

- Make non-substantial grammatical changes and renumber. The renumbering was necessary due to the deletion of new subsection 8106.1(g). New Subsection 8106.1(h) is renumbered to new subsection 8106.1(g). New Subsection 8106.1(i) is renumbered to new subsection 8106.1(h).

---

<sup>2</sup> Asimow, the Scope of Judicial Review of Decisions of California Administrative Agencies (1995) 48 UCLA Law Review 1157,1195

## **CHANGES TO THE RULEMAKING FILE (continued)**

Reference citations to New Section 8106.1 were amended to:

- Delete a vague reference to the Code of Federal Regulations (CFR). The reference was vague because it did not specify the dated version of the referenced CFR. To correct this error, CALPIA listed each referenced section and provided a specific date for clarity. CALPIA's reference to a dated version of the CFR remains the same even if changes occur to CFR in the future.

## **SUPPLEMENTAL TO THE INITIAL STATEMENT OF REASONS:**

A Supplemental to the Initial Statement of Reasons was added to provide more necessity and clarification to the rulemaking file. It provides clarity for the initial proposed text while also updating the list of materials relied upon to create the rulemaking file.

Clarification for New Subsection 8106.1(d)(2) is provided to explain the time constraint for an employee to produce a urine sample.

Descriptive language that describes impediment of drug testing in new subsections 8106.1(d)(1)-(3) is amended.

For further details and information on these changes, please refer to the attached Supplemental to the Initial Statement of Reasons.

For clarification purposes, the following materials were cited in the original ISOR, included in initial notice, were relied upon, and should be supplemented under the heading 'Reports Relied Upon' in the original ISOR.

- **Federal Register, 73 FR 71858 (November 25, 2008)**
- **'Drugs of Abuse' 2015 Edition, Resource Guide: U.S. Department of Justice Drug Enforcement**
- **Governor's Executive Order D-58-86, dated September 24, 1986**
- **Standard Agreement Number S1150006, CalHR/Comprehensive Drug Testing, Inc. w/Amendment: Terms of Agreement (Feb 1, 2012 – June 30, 2017)**

**AVAILABILITY OF RULEMAKING FILE:**

Copies of the rulemaking file for this regulatory action containing all information on which the proposal is based, is available to the public upon request directed to the CALPIA's contact person:

DAWN EGER, Legal Analyst  
California Prison Industry Authority  
560 East Natoma Street, Folsom, CA 95630  
Telephone (916) 358-1711

In the event the contact person is unavailable, requests for copies should be directed to the following back-up person:

DIANA HARBAUGH, Assistant to General Counsel  
California Prison Industry Authority  
560 East Natoma Street, Folsom, CA 95630  
Telephone (916) 358-1711

Electronic copies of the rulemaking file can be requested via email:

[PIAregs@calpia.ca.gov](mailto:PIAregs@calpia.ca.gov)